

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CLIFFORD F. TUTTLE, JR., et al.

Consolidated with

JOHN NICHOLAS, et al.

Plaintiffs,

v.

CITY OF HOUSTON, et al.

Defendants.

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CASE NO. 4:21-CV-00270

**FELIPE GALLEGOS'S MOTION TO STRIKE PLAINTIFFS' OBJECTION AND  
RESPONSE TO DEFENDANT FELIPE GALLEGOS'S DECLARATION [DKT. 359]**

Defendant Felipe Gallegos files this motion to strike a pleading that the Plaintiffs' captioned an "objection and response" (capitalization omitted) to evidence attached to Mr. Gallegos's reply brief. The Plaintiffs filed this "objection and response" at Dkt. 359, and this Motion to Strike refers to the pleading as the "Plaintiffs' Response."

The Plaintiffs' Response violates the Court's local rules because (i) to the extent the Plaintiffs' Response is some kind of legal objection to Gallegos's declaration (which does not appear to be the case), the Plaintiffs failed to confer in violation of this Court's Local Rule 5(c) and, alternatively, (ii) to the extent the Plaintiffs seek to respond to Gallegos's reply, this is a surreply filed without seeking or obtaining leave of court in violation of this Court's Local Rule 5(f).

As a result, the Plaintiffs' Response should be stricken.

- 1. To the extent the Plaintiffs have some legal objection to Mr. Gallegos’s declaration (which does not appear to be the case), they failed to confer, attempt to confer, or certify conference with respect to this objection, so the objection should be stricken.***

Although captioned alternatively as an “objection,” the Plaintiffs’ Response contains no legal objection to Mr. Gallegos’s declaration. The “objection”—to the extent there is one—appears to be that the Plaintiffs don’t like the content of Mr. Gallegos’s declaration because it corroborates the extensive summary judgment evidence that torpedoes the Plaintiffs’ new theory of the case.

But rather than engage with the content of the declaration on its own terms (which also would not constitute an “objection” as that term is generally used), the Plaintiffs construct a strawman by misleadingly omitting material portions of the declaration to create a fact issue.

For example, the Plaintiffs say “Gallegos claims that . . . ‘the picture . . . appears to depict a person wearing a long-sleeved Houston Narcotics t-shirt.’”<sup>1</sup> But the declaration actually says that the long-sleeved t-shirt has “the sleeves rolled up.”<sup>2</sup> The Plaintiffs omit the “rolled-up” portion of the declaration in an attempt to create a “gotcha” where none exists. Gallegos’s declaration (unlike the Plaintiffs’ new theory of the case) is totally consistent with the summary judgment evidence. But, as has been the Plaintiffs’ strategy throughout the summary judgment briefing, rather than engage with the actual evidence, the Plaintiffs just change it to suit their current purpose.

Similarly, the Plaintiffs try to score points by arguing that “Gallegos testified that he was ‘never on the side of the house where the figure labelled as “Gallegos” in this image is depicted,’” saying this testimony contradicts the Texas Rangers’ report.<sup>3</sup> But again, the Plaintiffs omit that

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<sup>1</sup> See Plaintiffs’ Response [Dkt. 359], at 2.

<sup>2</sup> See Gallegos Declaration [Dkt. 353-1], at ¶8.

<sup>3</sup> See Plaintiffs’ Response [Dkt. 359], at 2.

Gallegos actually testified he was not on that side of the house “from shortly after entry was made into the house.”<sup>4</sup> This is totally consistent with the Rangers’ report.

Thus, the Plaintiffs “objection” is simply a vehicle to mischaracterize Gallegos’s testimony. The Plaintiffs thus use the unauthorized pleading to misleadingly omit material that plainly and directly rebuts their arguments without so much as indicating the omission.

But perhaps most relevant for purposes of this motion, if there were some legal objection to the admissibility of Mr. Gallegos’s testimony, the Court’s Local Rule 5(c) required the Plaintiff’s to confer and give Mr. Gallegos an opportunity to cure the objection. Of course, the Plaintiffs eschewed this course because there is no legal objection (or basis for a legal objection) to Mr. Gallegos’s declaration.

In any event, the Plaintiffs’ failure to comply with conference requirements before filing their “objection” justifies striking the pleading.

***2. To the extent the Plaintiffs’ Response Responds to Mr. Gallegos’s Reply, the pleading is a surreply filed without leave of court in violation of Local Rule 5(f).***

Alternatively, to the extent the Plaintiffs’ Response is not an objection to Gallegos’s declaration, it is plainly a response to Gallegos’s reply, *i.e.*, a surreply. This Court’s Local Rules are quite clear, however, that “[s]ur-replies are rarely considered,” and that “[s]hould a party think one is necessary, the party must seek leave of Court.” *See* Local Rule 5(f).

For reasons that are not obvious, the Plaintiffs simply ignored this Court’s Local Rules related to motion practice—just as they have ignored, misrepresented, and obscured the content of the summary judgment record. In effect, the Plaintiff’s used their Response to reiterate the

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<sup>4</sup> *See* Gallegos Declaration [Dkt. 353-1], at ¶6.

arguments that Gallegos was required to counter in a five-page reply through a new surreply. This briefing was unnecessary, contrary to this Court's Local Rules, and should therefore be stricken.

### **CONCLUSION**

For the foregoing reasons, Felipe Gallegos respectfully requests that the Court strike the Plaintiffs' Response and grant such other and further relief to which Mr. Gallegos is entitled, whether in law or equity.

*[signatures on following page . . .]*

Dated: October 15, 2024

Respectfully submitted,

/s/ Russell Hardin, Jr.

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***ATTORNEYS FOR DEFENDANT***

***FELIPE GALLEGOS***

**CERTIFICATE OF CONFERENCE**

I conferred with the Plaintiffs regarding the relief requested in this motion, and they confirmed that they are opposed.

/s/ John MacVane

John MacVane

**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2024, a true and correct copy of the foregoing was delivered to all parties through their counsel(s) of record, in accordance with the Rules, via email or CM/ECF to the following:

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